No. 83-305

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

(1) Does the duty to preserve evidence under federal due process forbid the use in a drunk driving case of a breath testing machine which automatically expels and thus destroys the breath sample during the test process?

(2) Does the duty to preserve evidence under federal due process compel law enforcement to gather evidence for use of the defendant?

PARTIES TO PROCEEDING

The California Court of Appeal consolidated four separate cases in this proceeding, all of which involved drunk-driving prosecutions. In addition to respondent Trombetta (No. A016358), the decision affects Michael Gene Cox (No. A016374), Gregory Moller Ward (No. A017265), and Gale Bernell Berry (No. A017266). The Cox case (No. A016374) was itself a consolidated case which involved, in addition to Cox, Thomas Nelson Muldoon, Clinton James Brown, Densel Lee Furner, Patricia Jane Keeffe, Herbert John Berreyessa, and James K. Schneider.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

Petitioner, the People of the State of California, respondent below, respectfully petitions that a writ of certiorari issue to the California Court of Appeal, First Appellate District, to review the decision of that Court filed on March 28, 1983, as modified on

April 27, 1983, and held that law enforcement agencies must preserve a sample of the breath of a suspect tested on suspicion of drunken driving, or its equivalent, to satisfy federal due process standards.

OPINIONS BELOW

The opinion filed by the Court of Appeal on March 28, 1983, is reported at 141 Cal.App.3d 400, 190 Cal.Rptr. 319. [Appendix B.] This opinion was substantially modified on April 27, 1983, and the opinion as modified was ordered republished in its entirety appearing at 142 Cal.App.3d 138, ___ Cal.Rptr. ___. [Appendix A.]

JURISDICTION

On March 28, 1983, the California Court of Appeal for the First Appellate District filed its opinion dismissing

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appeals taken by two groups of defendants[1] and granting writs of habeas corpus as to two other groups; the opinion also established a rule binding upon future breath alcohol testing by agencies enforcing California's drunk driving laws. On April 27, 1983, a petition for rehearing was denied, and a substantially modified version of the original opinion was filed. On June 23, 1983, the California Supreme Court denied the People's petition for a hearing.

On July 1, 1983, the Court of Appeal issued an order staying issuance of the remittitur through August 30, 1983, to

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1. Although these appeals were dismissed on technical grounds, the decision is specifically applicable to the defendants who brought the appeals, none of whom have yet been tried on the drunk driving charges. As to these persons, the decision amounts to an order suppressing evidence. (See 142 Cal.App.3d at 140, 144; [A-17].)

permit the People to file a petition for certiorari in this Court.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The case involves interpretation of the due process clause of section 1 of the Fourteeneth Amendment to the Constitution, which provides, insofar as pertinent, that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

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STATEMENT OF THE CASE

Procedural Background

All of these cases involve efforts by defendants charged with violation of California's drunk driving laws to suppress the results of breath alcohol tests obtained on an Intoxilyzer machine.

In the Trombetta and Cox group of cases, the defendants made a pre-trial motion to suppress the Intoxilyzer test results, which motions were denied by the Municipal Court. The defendants then appealed to the Appellate Department of the Superior Court, which affirmed the Municipal Court, but certified the issue to the Court of Appeal. Although the Court of Appeal held that an appeal to the Appellate Department was not available (142 Cal.App.3d at 140-141; [A-3]), it nevertheless applied its decision to Trombetta and Cox (142

Cal.App.3d at 144; [A-17]) who have not yet been tried. The decision therefore acts as an order suppressing evidence in these two groups of cases.

In the Ward and Berry cases, the defendants had already been convicted of drunken driving and brought writs of habeas corpus in the Court of Appeals challenging their convictions. The decision orders new trials for these defendants at which trials evidence of the breath-test results will be excluded (142 Cal.App.3d at 145; [A-18]).

Facts

Under California law, a drunk driving suspect is given his choice of submitting to a test of his blood, breath, or urine. (Calif. Veh. Code, § 13353(a).) Each of these defendants, after a lawful arrest on suspicion of drunk driving, was given a breath test upon an Intoxilyzer, an approved test

instrument, for the purpose of determining his blood alcohol level. The legal issues turn upon the operation of the instrument itself.

The following explanation of Intoxilyzer operation is found in People v. Miller (1975) 52 Cal.App.3d 666, 668-669, 125 Cal.Rptr. 341, 342:[2/]

> "The subject's breath is captured in a metal chamber, infrared energy of fixed intensity and wave length is passed through the chamber from one

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2. People v. Miller provides what is the clearest and most succinct of all Intoxilyzer explanations. In the present case, the Court of Appeal did not quarrel with that explanation and in fact cited it (142 Cal.App.3d at 141-142; [A-7]). Miller, however, found the Intoxilyzer constitutional and rejected the very argument successfully made in Court of Appeal here (52 Cal.App.3d at 669-670, 125 Cal.Rptr. at 342-343). It was this portion of Miller with which the Court of Appeal "fundamentally disagreed." (142 Cal.App.3d at 143-144; [A-14].)

side of a photo-electric cell on the other side. Alcohol absorbs light of the fixed wave length. The device computes the loss of energy, translates the result in terms of the grams of alcohol per 100 milliliters of blood, and prints the result upon a card. In the prescribed operation of the device, clean air is first tested, then the breath of the subject. The chamber is then purged by blowing clear air through it, the clear air is tested, and all three results appear upon the printed card. The two tests of clear air constitute a test of the machine, and should show zero alcohol content. It is apparent that no test result, save the printout

card, was available for preservation."

The following facts concerning the operation of the Intoxilyzer were found by the Municipal Court judge in the Trombetta case:[3]

"It appears to this court that from the testimony elicited and from the evidence submitted, that at best a state when using the 4011-W Intoxilyzer unit, temporarily collects or gathers breath of a tested individual. The chamber which collects this

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3. The only factual findings at the trial level were made in the Trombetta case. A copy of Judge Antolini's findings are included as Appendix C. The Cox group of cases came from the same county as Trombetta and were governed by that finding. No factual findings were made in Ward or Berry since the trial court considered itself bound by the decision in People v. Miller (1975) 52 Cal.App.3d 666, 125 Cal.Rptr 341, which has already been quoted.

breath contains it only for a period of time necessary to conduct an analysis of this breath. By the construction of the machine itself, namely that of having two or[i]fices, one for introduction and one for the expulsion of the sample, it appears to the court that the temporary control over the breath makes the ultimate dissipation and destruction of the sample an inherent and obvious consequence of using that particular intoxilyzer unit. The argument that the state is in control of the breath and that by choosing to purge that sample, destroys it, is an argument that in the court's opinion is reductio ad absurdum. Mr. Murray, the defense

witness, stated in substance, that the intoxilyzer collects breath but not for later analysis and then must be purged in order to be useable again. Without an addition to the present intoxilyzer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample. Therefore, it would appear to the court that the destruction of any temporarily collected sample would not be through the actions or efforts of the state, but rather through the workings of the machine itself."

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REASONS FOR GRANTING THE WRIT

Years ago in Brady v. Maryland (1963) 373 U.S. 83, this Court established a federal due process requirement to preserve material evidence favorable to the accused. Purporting to apply this standard, the California Court of Appeal held that use of a machine to test the breath of a suspected drunken driver is unconstitutional unless a sample of the defendant's breath, or its equivalent, is preserved. Since the machine is not designed to preserve a sample, and in fact automatically destroys the sample tested by pumping it into the air after the test is run, the decision forbids use of that device which is the overwhelming choice (82%) of California law enforcement agencies. Furthermore, the decision effectively condemns all California breath-testing instruments, none of which preserve breath samples, and hence the

test method used in two-thirds of California's drunk driving cases. As this Court has recognized in South Dakota v. Neville (1983) ___ U.S. ___, ___, 103 S.Ct 916, 920, 74 L.Ed. 748, 755, the importance of enforcing drunk driving laws cannot be overemphasized.

This Court has not addressed the evidence preservation requirement of federal due process for many years, and the Brady duty has received different interpretations by state courts. In California, an earlier appellate decision specifically approved the instrument now condemned, rejecting the very argument now adopted. (People v. Miller (1975) 52 Cal.App.3d 666, 125 Cal.Rptr. 341.) The breath preservation requirement has similarly resulted in a split of authority among other state courts. (See Baca v. Smith (Ariz. 1980) 604 P.2d 617 (required); Garcia v. Dist. Court,

21st Jud. Dist. (Colo. 1979) 589 P.2d 924 (required); State v. Lee (Fla.App. 1982) 422 S.2d 76 (rejected); People v. Reed (Ill.App. 1981) 416 N.E.2d 694 (rejected); State v. Young (Kan. 1980) 614 P.2d 441 (rejected); Montoya v. Metropolitan Court (N.M. 1982) 651 P.2d 1260 (rejected); State v. Larson (N.D. 1981) (rejected); State v. Newton (S.C. 1980) 262 S.E.2d 906 (rejected); State v. Cornelius (N.H. 1982) 452 A.2d 464, 465 (rejected). Only this Court can resolve the dispute.

The decision below essentially requires law enforcement agencies to collect evidence for possible use by the accused--an extension of the Brady doctrine with astounding consequence. We do not believe that was ever intended by Brady, and that a clear statement of the parameters of the federal due process

preservation requirement from this Court is needed.

I

THERE IS NO PRESERVATION REQUIREMENT WITHOUT PRACTICAL PHYSICAL POSSESSION.

The Intoxilyzer, as described in People v. Miller (1975) 52 Cal.App.3d 666, 668-669, 125 Cal.Rptr. 341, 342, and by Judge Antolini here, temporarily holds a breath sample blown into it by a drunk driving suspect, and then after the infrared analysis is made, automatically pumps the sample out into the room air. This purging is necessary to run the test itself since a sample of room air is also tested on the machine to insure that the machine is operating accurately. It is also necessary to pump out the air in order to use the instrument again with other suspects. This is how the machine was designed by

its manufacturer.[4]

Whatever the preservation standard of Brady v. Maryland (1963) 373 U.S. 83, it does not extend to evidence which the state did not possess in a form permitting preservation as a practical manner. What Brady requires is that once the state has taken evidence into its possession, it cannot throw it away. This duty cannot extend to something that the state never had in the first place. (People v. Miller (1975) 52 Cal.App.3d 666, 669-670, 125 Cal.Rptr. 341, 343; State v. Young (Kan. 1980) 614 P.2d 441, 446.) As noted in Miller, supra, "The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but

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4. All breath testing instruments approved in California destroy the sample. In the Breathalyzer, the sample is chemically consumed; in the gas chromatograph devices, the sample is burned.

it was not evidence of which the government could 'take possession.'"

Up until now, it has been held that a test procedure which by its nature destroys the material tested does not violate federal due process. (See People v. Vick (1970) 11 Cal.App.3d 1058, 1066, 90 Cal.Rptr. 236, 241-242 (autopsy; body destroyed); State v. Lightle (Kan. 1972) 502 P.2d 834 (chemical test; pills destroyed); State v. Carlson (Minn. 1978) 267 N.W.2d 170 (chemical test; bloodstain destroyed); State v. Cloutier (Me. 1973) 302 A.2d 84 (chemical test; pill destroyed); Partin v. State (Ga. 1978) 232 S.E.2d 46 (chemical test; cocaine destroyed); United States v. Love (5th Cir. 1973) 482 F.2d 213, 218-219 (chemical test; gun powder residue destroyed); State v. Thomas (Wash. 1969) 454 P.2d 203 (chemical test; marijuana sample

destroyed). In rejecting a Brady attack on another breath testing instrument, the Kansas Supreme Court was correct when it concluded that "the prosecution cannot be accused of failing or refusing to disclose exculpatory evidence which does not exist." (State v. Young (Kan. 1980) 614 P.2d 441, 446.)

II

THERE IS NO REQUIREMENT TO GATHER MATERIAL FOR THE ACCUSED, ESPECIALLY WHERE OF SPECULATIVE VALUE.

California's evidence preservation requirement arises from People v. Hitch (1974) 12 Cal.3d 641, 645-646, 650, 117 Cal.Rptr. 9, 12-13, 15, 527 P.2d 361, 364-365, 367, which found the federal genesis in Giglio v. United States (1971) 405 U.S. 150, 153-154; Brady v. Maryland (1963) 373 U.S. 83, 87; and United States v. Bryant (D.C. Cir. 1971) 439 F.2d 642, 651. In Moore v. Illinois (1972) 408

U.S. 783, 794-795, this Court explained that:

> "The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

Brady does not require the state to take affirmative steps and gather evidence for the accused. Yet that is what the California Court of Appeal insists upon here. As noted in People v. Miller (1975) 52 Cal.App.3d 666, 670, 125

Cal.Rptr. 341, 343, with the Intoxilyzer "The only element reducible to possession was the printout card, which has been preserved." In finding the facts below, Judge Antolini observed that "Without an addition to the present intoxilyzer unit . . . it would be impossible to exercise permanent control resulting in preservation of any sample." Requiring the state to develop some system for retaining a breath sample represents affirmative conduct for the sole benefit of the accused--something never before required as a Brady duty. The difficulty posed to law enforcement by such an obligation is apparent. As the court observed in People v. Miller, supra,

> "The unwarranted extension . . . could have strange and unsettling results. If all evidence which can be made demonstrative must be so

> transformed, we shall encounter problems with extrajudicial declarations which, with fortuitous foresight, could have been tape-recorded, and eyewitness observations of events which could have been photographed."

In rejecting the claimed duty to preserve breath in State v. Young (Kan. 1980) 614 P.2d 441, 446, and the opinions of courts which required it, the Kansas Supreme Court observed:

> "The basis for this requirement in this case is not well defined. These courts seem to be aware that other courts do not require an extra sample. They hold in a general way, however, that it is incumbent upon the state to employ regular procedures to preserve

> evidence for the defendants. They require a state agent, in the regular performance of his duties, to reasonably foresee what evidence 'might be favorable to the accused' and to obtain and preserve the same for the defendant's use. [Citation.] The difficulty of accepting this logic in the present case is apparent. The item in question here is merely a sample of breath from the accused himself, which he alone can furnish for independent testing by his own physician as authorized by . . . [statute]."

Like Kansas, California law specifically provides that a drunk-driving suspect has an absolute right to have his own sample collected and tested by his own expert. (Cal. Veh. Code, § 13354(b).) Police

officers are forbidden from interfering with that right. (See People v. Superior Court (Scott) (1980) 112 Cal.App.3d 602, 605, 169 Cal.Rptr. 412, 413.) Due process does not require more. (State v. Young, supra; State v. Cornelius (N.H. 1982) 452 A.2d 464, 465.)

Nor could a Brady duty to preserve a breath sample possibly arise unless it were proven that a practical means of preservation exists which permits a reliable retest. As the Florida Court of Appeal noted in State v. Lee (Fla.App. 1982) 422 S.2d 76, 78:

> "Although some courts have held that failure by the state to automatically preserve a breath sample is tantamount to suppression of evidence, those holdings have come where the defendant has shown that the

> preservation was scientifically possible. . . . We have found no case which has considered the defendant's due process contention concerning the state's failure to produce a breath sample without evidence and findings at the trial level that it was scientifically possible for the state to collect and preserve such a sample."

(Accord, People v. Reed (Ill.App. 1981) 416 N.E.2d 694, 697.) The trial court below did not make such a finding. The California Court of Appeal refused to address the issue.

The Court of Appeal placed great reliance on Garcia v. Dist. Court, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924, 928-929, in which there was evidence that samples could be preserved. In view of the subsequent field experience with the

"Colorado method" outline in Montoya v. Metropolitan Court (N.M. 1982) 651 P.2d 1260, 1261, in which the head of Colorado's Department of Health testified that the retests were erroneous 80-90 percent of the time, it can hardly be contended that a "preserved" breath sample would yield material evidence for the accused. Not only are there no breath analysis instruments approved for use in California[5] which themselves capture and preserve a breath sample, but there are no capturing devices approved to attach to them. As a

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5. Under California law, law enforcement agencies may only use instruments which have been tested and evaluated by the state Department of Health. (Calif. Health & Saf. Code., § 436.52.) "The intoxilyzer has been subjected to rigid scrutiny and testing by a state agency qualified in this technical field. It has been approved for use under the detailed regulations prescribed by that agency." (People v. Miller (1975) 52 cal.App.3d 666, 670, 125 Cal.Rptr. 341, 343.)

matter of fact, the scientific body which the California Legislature established to advise the Department of Health on matters of this sort (Calif. Health & Saf. Code, § 436.50) has recently concluded that no device currently exists anywhere which would permit a reliable retest of a breath sample. (Advisory Committee on Alcohol Determination, Department of Health, Notes of Meeting of August 31, 1982, p. 29.) This unreliability has prompted a number of state courts to reject retention requirements. (See State v. Phillipe (Fla.App. 1981) 402 S.3d 33, 34; State v. Larson (N.D. 1981) 313 N.W.2d 750, 755-756; id.; State v. Newton (S.C. 1980) 262 S.E.2d 906, 909 n. 1.) Federal courts have never found a Brady violation where the destroyed evidence would not tend to exculpate the defendant or had no real evidentiary value. (See Norris v.

Slayton (4th Cir. 1976) 540 F.2d 1241, 1243-1244; Fields v. Alaska (9th Cir. 1975) 524 F.2d 259, 260-261; Bergenthal v. Cady (7th Cir. 1972) 466 F.2d 635, cert. den., 409 U.S. 1109; Riley v. Sigler (8th Cir. 1971) 437 F.2d 258, 259-260; see also United States v. Agurs (1976) 427 U.S. 97, 109 n. 16.) Brady does not require preservation of "any evidence which might conceivably aid the defense in the preparation of its case." (Williams v. Wolf (8th Cir. 1973) 473 F.2d 1049, 1054.) "This extension of the Brady doctrine is not justified as a mater of constitutional law." (Edwards v. Oklahoma (D. Okla. 1976) 429 F.Supp. 668, 671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978).)

An even greater step beyond Brady was made when the Court of Appeal required the state to "preserve the captured evidence or its equivalent for

the use of the defendant." (142 Cal.App.3d at 144; emphasis added.) Of the devices approved in California, only the Intoxilyzer is non-destructive; the others physically consume the sample in the test process. (See fn. 4, supra.) This would mean that a completely different sample than even the police used would have to be taken for the defendant's testing. And in the case of the Intoxilyzer, even the retention devices used in Colorado do not preserve the breath; they purport to capture the alcohol portion of the breath with an absorbant. In other words, there is no device whatsoever which would permit the defendant to retest--however unreliable--the same sample in the same form as that tested by the police.

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CONCLUSION

Petitioner respectfully requests this Court to grant certiorari to review this significant federal issue and provide a clear exposition of the standard which should guide the various state courts.

DATED: August 22, 1983

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APPENDIX A

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE, A016358

Plaintiff and Respondent,

v. (Sonoma Sup. Ct. No. 209-C)

ALBERT WALTER TROMBETTA,

Defendant and Appellant.

THE PEOPLE, A016374

Plaintiff and Respondent,

v. (Sonoma Sup. Ct. No. 215-3)

MICHAEL GENE COX, et al.,

Defendants and Appellants.

In re GREGORY MOLLER WARD on Habeas Corpus. A017265 1 Crim. 23779

In re GALE BERNELL BERRY on Habeas Corpus. A017265 1 Crim 22517

These cases arise, in diverse procedural settings, from misdemeanor prosecutions for driving under the influence of intoxicating liquor (formerly Veh. Code

§§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). The issue raised is whether intoxilyzer breath results are rendered inadmissible in a trial for driving under the influence of intoxicating liquor by virtue of the failure of law enforcement officials to preserve a retestable breath sample.

In each case the municipal court denied the defendant's common law motion to suppress the evidence obtained from an intoxilyzer breath test. Each defendant then appealed to the superior court which affirmed the lower court order; the cases were then certified for transfer to this court. In the Trombetta and Cox groups of cases this court accepted transfer. It appears that Trombetta and its companion case have not proceeded to trial. The record does not indicate whether the cases in the Cox group have proceeded to

trial; no judgment was entered in these cases.

An appeal may not be taken from a pretrial order of the municipal court. (Code Civ. Proc., § 904.2.) The correct procedure in Trombetta and Cox would therefore have been for the defendants to wait until a judgment was entered in the municipal court and then appeal that judgment. Because no appealable order was challenged in Trombetta and Cox those appeals should have been dismissed by the appellate department of the superior court. (People v. Superior Court (Scott) (1980) 112 Cal.App.3d 602, 606.)

In the Ward and Berry cases judgments of conviction were followed by superior court appeals; transfers to the Court of Appeal were denied whereupon those defendants petitioned the Supreme Court for writs of habeas corpus. The

Supreme Court issued orders in Ward and Berry to show cause before this court why relief should not be granted.

Each defendant was arrested for driving under the influence of alcohol. (Formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). Each was asked to select any one of three blood alcohol level tests (breath, blood, or urine). Law enforcement officers urged the defendants to select the breath test and each did select that test. The breath tests were conducted on an Omicrom Intoxilyzer. Each defendant's breath registered an alcohol level of at least 0.10. No defendant was told that a breath sample would be saved.

The Legislature has established a presumption that a driver whose blood alcohol level is less than 0.05 percent is not under the influence of an

alcoholic beverage. If the blood alcohol level is between 0.05 percent and 0.10 percent, no presumption arises. (Veh. Code, § 23155, subd. (a).) However, another statute provides "It is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public. . . ." (Veh. Code, § 23152, subd. (b).) Thus, the statute establishes guilt where chemical blood alcohol tests prove that the percent of alcohol is 0.10 percent or more, without any showing of actual impairment.

Given the importance of accurate determination of blood alcohol levels, and the greater convenience of breath testing as opposed to testing of blood or urine, the Legislature has directed the State Department of Health Services

to establish by regulation, procedures to be used by law enforcement agenices in administering breath tests for the purposes of determining the concentrations of alcohol in a person's blood. (Health & Saf. Code, § 436.52.) These regulations are contained in title 17 of the California Administrative Code, sections 1220 et seq. Three of the breath testing devices which require discussion had been approved by the Department of Health Services as of December 20, 1979: the intoxilyzer, the breathalyzer, and the intoximeter field crimper-indium tube encapsulation kit.

A brief description of the operation of the intoxilyzer follows: Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air (Cal. Admin. Code, tit. 17,

§ 1219.3); to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol. (See People v. Miller (1975) 52 Cal.App.3d 666, 668-669.) The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.

The breathalyzer operates on a completely different principle. (See

People v. Hitch (1974) 12 Cal.3d 641, 644.) To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution. The test ampoule and the test solution can then be retained for retesting by the defendant.

Finally, the operation of the intoximeter field crimper-indium tube encapsulation kit must be considered. This "kit" can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath collection as opposed to a breath testing device. The subject blows into

an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)

Defendants contend that there are three grounds upon which this court should require suppression of the

evidence obtained from the intoxilyzer tests: the duty of the prosecution to preserve evidence, equal protection, and requirements of informed consent. We deal only with the first ground.

The contention is that under People v. Hitch, supra, 12 Cal.3d 641, the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxilyzer results inadmissible. In Hitch, the Supreme Court held that a law enforcement agency conducting a chemical test for alcohol has a duty to preserve and disclose all material evidence which the agency has gathered. The court held that a due process violation occurred when the defendant's test specimen and test solution from a breathalyzer test were discarded. The defendant's eventual attempts to utilize discovery to verify independently the alcoholic content of

the ampoule, to ascertain that exactly three centimeters of the solution had been used, and to examine the glass ampoule itself for any defects which would alter the alcohol reading were thus unfairly frustrated. (Id., at pp. 649-650.)

The Hitch court, in considering the admissibility of "breathalzyer" results, determined initially that the results of the blood alcohol test "by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving." (Id., 12 Cal.3d at p. 647.) The court held that the investigative agency involved in the test has a duty not only to disclose such material evidence but also to preserve it. Accordingly, the court stated that "where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction

by the investigative officials, sanctions shall . . . be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]. The prosecution shall bear the burden of demonstrating that such duty to preserve the [evidence] has been fulfilled." (Id., at pp. 652-653.) If this burden is not met, the results of the test are to be excluded at trial. Since the Hitch rule implements a federal due process standard, (id., at pp. 645, 646) it is unaffected by California Constitution, article I, section 28, subdivision (d). (See Brosnahan v. Brown (1982) 32 Cal.3d 236.)

In the present case, it is conceded that no effort was made to capture breath

specimens for later testing by the defense. Defendants contend that the intoxilyzer evidence should therefore have been excluded from trial.

In denying many recent motions to exclude intoxilyzer results, many lower courts have relied on People v. Miller, supra, 52 Cal.App.3d 666. In Miller, the Court of Appeal examined "the question [of] whether the recent decision of the Supreme Court (People v. Hitch, 12 Cal.3d 641) should be extended to render inadmissible the results of all chemical tests of breath conducted by use of the "Omicron Intoxilyzer.'" (People v. Miller, supra, 52 Cal.App.3d at p. 668.) The Miller court determined that "Hitch merely holds that evidence which the prosecution once possesses must be held. The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but

it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card, which has been preserved." (Id., at pp. 669-670.)

We disagree fundamentally with the Miller characterization of what happens when a breath sample is taken. That is, in our view, such a taking is the collection of evidence within the Hitch rationale. The question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.

A similar situation confronted the Colorado Supreme Court in Garcia v. Dist. Court, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924. Colorado, like California, uses urine, blood or breath tests for a determination of alcohol level, and

samples of blood and urine "are customarily preserved for the use of the defense and to insure that the test is accurate." (At. p. 926.) In further similarity to California, a presumption of driving under the influence arises from a certain level of alcohol in the blood. (Ibid.)

Two fact situations were before the Garcia court. In one, the breathalyzer tests and ampoules were destroyed in accordance with standard police procedures; in the other, the defendant was given a "Luckey Alco-Analyzer" breath test, which could not preserve a sample for testing. In both cases, the defendants' motions to suppress the results of the tests were denied.

Recognizing that in the first situation a sample of the defendant's breath "could have been preserved", and in the second other methods existed to preserve

the defendant's breath, the court concluded: "The failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence." (At. pp. 929-930.) "We hold, therefore, that in all cases where a defendant elects to submit to a breath test to determine his blood alcohol level, he must be given a separate sample of his breath at the time of the test or the alcoholic content of his breath in a manner which will permit scientifically reliable independent testing by the defendant, if that test is to be used as evidence. [Citations.]" (At. p. 930.)

We are persuaded that the reasoning of the Colorado court -- parelleling the Hitch rationale -- is sound and that the same result should prevail in California.

Due process demands simply that where evidence is collected by the state, as it is with the intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. (People v. Hitch, supra, 12 Cal.3d at pp. 652-653.)

With the exception of the cases reviewed in this decision (i.e., A016358, A016374, A017265, A017266) this holding will apply prospectively only to tests performed after this decision has become final. Although we place primary reliance upon People v. Hitch, supra, 12 Cal.3d 641, it may reasonably be presumed that law enforcement activities in breath taking have been performed in good faith reliance upon People v. Miller, supra, 52 Cal.App.3d 666, which,

as we have noted, reached a conclusion contrary to our holding today.

The Trombetta and Cox groups of appeals are dismissed; in the Ward and Berry proceedings, writs of habeas corpus will issue granting new trials at which the intoxilyzer evidence will be excluded.

Certified for Publication.

Poche, J.

I concur:

Rattigan, Acting P.J.

People v. Trombetta, (Cox, Ward & Berry)
A016358, A016374, A017265, A017266

People v. Trombetta, et al.
A016358, A016374, A017265, A017266

I concur fully in the judgment and write separately only to emphasize that by this decision we do not prescribe or recommend any particular devices or procedures but hold simply that those before us in these cases do not satisfy the due process requirements of People v. Hitch (1974) 12 Cal.3d 641. In each case, the arresting officer urged the defendant to choose the breath rather than the blood or urine test but failed to inform him that as a consequence of this selection no sample would be retained. In none did the officer advise the driver of his right to preservation of a breath sample and obtain from him a waiver of that right. The Arizona Supreme Court has held that such a procedure is constitutionally adequate. (Baca v. Smith (1979) 604 P.2d

617, 618-620.) As no driver here gave a knowing and intelligent waiver of his right to preservation of evidence, that question is not reached here. Similarly, we do not consider here a situation in which police establish and diligently follow rigorous and systematic procedures for preservation of samples but circumstances beyond their control frustrate retention of a sample in a particular instance. As the majority opinion indicates, the core requirement of Hitch is establishment of and adherence to procedures which ensure fairness in the administration of field tests. The responsibility for designing those procedures lies with the Legislature and with state and local law enforcement agencies.

Christian, J.

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE, A016358

Plaintiff and Respondent,

v. (Sonoma Sup. Ct. No.
ALBERT WALTER TROMBETTA, 209-C)

Defendant and Appellant.

THE PEOPLE, A016374

Plaintiff and Respondent,

v. (Sonoma Sup. Ct. No.
MICHAEL GENE COX, et al., 215-3)

Defendants and Appellants.

In re GREGORY MOLLER WARD A017265
on Habeas Corpus. 1 Crim. 23779

In re GALE BERNELL BERRY A017265
on Habeas Corpus. 1 Crim 22517

These cases arise, in diverse procedural settings, from misdemeanor prosecutions for driving under the influence of intoxicating liquor (formerly Veh. Code

§§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). The issue raised is whether intoxilyzer breath results are rendered inadmissible in a drunk driving trial by virtue of the failure of law enforcement officials either (1, to preserve a retestable breath sample although a device which preserves breath samples for retesting is available, or (2) to inform the detained motorist that no retestable specimen will be preserved if he selects breath rather than blood or urine as the test medium.

In each municipal court case the defendant moved to suppress evidence obtained from an intoxilyzer breath test. (Pen. Code, § 1538.5.) These motions were denied. Each defendant then appealed to the superior court which affirmed the lower court order; the cases were then certified for transfer to this

court. In the Trombetta and Cox groups of cases this court accepted transfer. It appears that Trombetta and its companion case have not proceeded to trial. The record does not indicate whether the cases in the Cox group have proceeded to trial; no judgment was entered in these cases.

An appeal may not be taken from a pretrial order of the municipal court. (Code. Civ. Proc., § 904.2.) The correct procedure in Trombetta and Cox would therefore have been for the defendants to wait until a judgment was entered in the municipal court and then appeal that judgment. Because no appealable order was challenged in Trombetta and Cox those appeals should have been dismissed by the appellate department of the superior court. (People v. Superior Court (Scott) (1980) 112 Cal.App.3d 602, 606.)

In the Ward and Berry cases judgments of conviction were followed by superior court appeals; transfers to the Court of Appeal were denied whereupon those defendants petitioned the Supreme Court for writs of habeas corpus. The Supreme Court issued orders in Ward and Berry to show cause before this court why relief should not be granted.

Each defendant was arrested for driving under the influence of alcohol. (Formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). Each was asked to select any one of three blood alcohol level tests (breath, blood, or urine). Law enforcement officers urged the defendants to select the breath test and each did select that test. The breath tests were conducted on an Omicrom Intoxilyzer. Each defendant's breath registered an alcohol level of at least

0.10. No defendant was told that a breath sample would be saved.

The Legislature has established a presumption that a driver whose blood alcohol level is less than 0.05 percent is not under the influence of an alcoholic beverage. If the blood alcohol level is between 0.05 percent and 0.10 percent, no presumption arises. (Veh. Code, § 23155, subd. (a).) However, another statute provides "It is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public. . . ." (Veh. Code, § 23152, subd. (b).) Thus, the statute establishes guilt where chemical blood alcohol tests prove that the percent of alcohol is 0.10 percent or more, without any showing of actual impairment.

Given the importance of accurate determination of blood alcohol levels, and the greater convenience of breath testing as opposed to testing of blood or urine, the Legislature has directed the State Department of Health Services to establish by regulation, procedures to be used by law enforcement agenices in administering breath tests for the purposes of determining the concentrations of alcohol in a person's blood. (Health & Saf. Code, § 436.52.) These regulations are contained in title 17 of the California Administrative Code, sections 1220 et seq. Three of the breath testing devices which require discussion were approved by the Department of Health Services as of December 20, 1979: the intoxilyzer, the breathalyzer, and the intoximeter field crimper-indium tube encapsulation kit.

A brief description of the operation of the intoxilyzer follows: Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air (Cal. Admin. Code, tit. 17, § 1219.3); to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol. (See

People v. Miller (1975) 52 Cal.App.3d 666, 668-669.) The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.

The breathalyzer operates on a completely different principle. (See People v. Hitch (1974) 12 Cal.3d 641, 644.) To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution. The test ampoule and the test solution can then be retained for retesting by the defendant.

Finally, the operation of the intoximeter field crimper-indium tube encapsulation kit must be considered. This

"kit" can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath collection as opposed to a breath testing device. The subject blows into an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is

approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)

Defendants contend that there are three grounds upon which this court should require suppression of the evidence obtained from the intoxilyzer tests: the duty of the prosecution to preserve evidence, equal protection, and requirements of informed consent. We deal only with the first ground.

The contention is that under People v. Hitch, supra, 12 Cal.3d 641, the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxilyzer results inadmissible. In Hitch, the Supreme Court held that a law enforcement agency conducting a chemical test for alcohol has a duty to preserve

and disclose all material evidence which the agency has gathered. The court held that a due process violation occurred when the defendant's test specimen and test solution from a breathalyzer test were discarded. The defendant's eventual attempts to utilize discovery to verify independently the alcoholic content of the ampoule, to ascertain that exactly three centimeters of the solution had been used, and to examine the glass ampoule itself for any defects which would alter the alcohol reading were thus unfairly frustrated. (Id., at pp. 649-650.)

The Hitch court, in considering the admissibility of "breathalzyer" results, determined initially that the results of the blood alcohol test "by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving." (Id., 12

Cal.3d at p. 647.) The court held that the investigative agency involved in the test has a duty not only to disclose such material evidence but also to preserve it. Accordingly, the court stated that "where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions shall . . . be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]. The prosecution shall bear the burden of demonstrating that such duty to preserve the [evidence] has been fulfilled." (Id., at pp. 652-653.) If this burden is not met, the results of the test are to be excluded at trial. Since the Hitch

rule implements a federal due process standard, (id., at pp. 645, 646) it is unaffected by California Constitution, article I, section 28, subdivision (d). (See Brosnahan v. Brown (1982) 32 Cal.3d 236.)

In the present case, it is conceded that no effort was made to capture breath specimens for later testing by the defense despite the availability of the indium tube encapsulation kit. Petitioners contend that the intoxilyzer evidence should therefore have been excluded from trial.

In denying many recent motions to exclude intoxilyzer results, many lower courts have relied on People v. Miller, supra, 52 Cal.App.3d 666. In Miller, the Court of Appeal examined "the question [of] whether the recent decision of the Supreme Court (People v. Hitch, 12 Cal.3d 641) should be extended to render

inadmissible the results of all chemical tests of breath conducted by use of the "Omicron Intoxilyzer.'" (People v. Miller, supra, 52 Cal.App.3d at p. 668.) The Miller court determined that "Hitch merely holds that evidence which the prosecution once possesses must be held. The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card, which has been preserved." (Id., at pp. 669-670.) Miller may be factually distinguished in that there, no means had been shown by which to preserve a breath sample; the technology has now evolved so that such preservation is possible by use of the indium tube encapsulation kit. A new analysis is therefore in order.

Here, where the evidence has already been "collected" by the prosecution, the question is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.

The Colorado Supreme Court, confronted with a record that was, like ours, "replete with evidence that a sample of the defendant's breath could have been preserved inexpensively and expediently" held that the "failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence. It is incumbent upon the state to employ regular procedures to preserve evidence which a state agent, in the regular performance of his duties, could reasonably foresee "might"

be "favorable" to the accused.'" (Garcia v. Dist. Court, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924, 928, 929-930.) We are persuaded that the reasoning of the Colorado court is sound and that the same result should prevail in California.

In breath testing by means of the devices presently approved for use in California, the specimen actually tested cannot be retained. The indium tube, an approved device, can, however, be utilized to capture a contemporanous specimen and preserve it for later testing. When an intoxilyzer is used, the law enforcement agency must employ rigorous and systematic procedures to ensure the preservation of the captured breath sample, or a contemporaneous similar sample, for testing by the defense unless there is a knowing waiver of that right. As with Hitch, however, this holding will apply only prospectively to tests

performed after this decision has become final with the exception that it will also be applicable to the cases now under review, including those not yet tried in which the present appeals must be dismissed.

It has been suggested that technology exists in the form of a device called "silica gel tubes" whereby the actual breath exhaled into the intoxilyzer could be retained. (See People v. Riggs (Colo. 1981) 635 P.2d 556, 558.) This attachment does not, however, appear on the list of breath testing instruments approved for use in California. Were this device to be approved by the Department of Health Services, it would, of course, provide another alternative method of complying with the Hitch requirements of evidence preservation. Law enforcement agencies are free to use their discretion to

utilize whatever devices are available to meet this duty. Due process does not require the use of any particular instruments. It demands simply that where evidence is collected by the state, as it is with the intoxilyzer, the agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. (People v. Hitch, supra, 12 Cal.3d at pp. 652-653.)

The Trombetta and Cox groups of appeals are dismissed; in the Ward and Berry proceedings, writs of habeas corpus will issue granting new trials at which the intoxilyzer evidence will be excluded.

Certified for Publication.

Poche, J.

I concur:

_____
Rattigan, Acting P.J.

People v. Trombetta, (Cox, Ward & Berry)
A016358, A016374, A017265, A017266

People v. Trombetta, et al.
A016358, A016374, A017265, A017266

I concur fully in the judgment and write separately only to emphasize that by this decision we do not prescribe or recommend any particular devices or procedures but hold simply that those before us in these cases do not satisfy the due process requirements of People v. Hitch (1974) 12 Cal.3d 641. In each case, the arresting officer urged the defendant to choose the breath rather than the blood or urine test but failed to inform him that as a consequence of this selection no sample would be retained. In none did the officer advise the driver of his right to preservation of a breath sample and obtain from him a waiver of that right. The Arizona Supreme Court has held that such a procedure is constitutionally adequate. (Baca v. Smith (1979) 604 P.2d 617, 618-620.) As no driver

here gave a knowing and intelligent waiver of his right to preservation of evidence, that question is not reached here. Similarly, we do not consider here a situation in which police establish and diligently follow rigorous and systematic procedures for preservation of samples but circumstances beyond their control frustrate retention of a sample in a particular instance. As the majority opinion indicates, the core requirement of Hitch is establishment of and adherence to procedures which ensure fairness in the administration of field tests. The responsibility for designing those procedures lies with the Legislature and with state and local law enforcement agencies.

Christian, J.

APPENDIX C

JUDGE LAWRENCE G. ANTOLINI
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MUNCIPAL COURT FOR THE COUNTY OF SONOMA

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	NO. 78532 TCR NO. 78402 TCR
vs.	)	
MELINDA PIERSON BERTRAM, ALBERT WALTER TROMBETTA,	)	RULING ON 1538.5 and OTHER MOTIONS
Defendants.	)	

The court hereby denies the 1538.5 and stipulated 402 motion in the above-entitled cases. The court's decision is based upon the evidence and testimony admitted before it and also based upon the briefs and all cases cited by both the people and the defense. I therefore will not be reiterating all the above

mentioned arguments and cases. I will comment, however, upon the most prevalent of the many issues presented. The first of these is a factual as well as a legal issue that must be addressed namely whether or not the breath sample "collected" comes under the auspices of the Hitch and Nation mandates. The art of semantics for many years has been the subject matter of courses taught at many of the outstanding universities in the world. Indeed then, the interpretation and or interpolation of words can only be considered to be accurate, when taken in the light of all the surrounding circumstances of a particular situation. The verb "collect" or "gather together" may be either of a temporary or permanent nature. It appears to this court that from the testimony elecited and from the evidence submitted, that at best a state when using the 4011-W Intoxilizer unit,

temporarily collects or gathers breath of a tested individual. The chamber which collects this breath contains it only for a period of time necessary to conduct an analysis on this breath. By the construction of the machine itself, namely that of having two or[i]fices, one for introduction and one for the expulsion of the sample, it appears to the court that the temporary control over the breath makes the ultimate dissipation and destruction of the sample an inherent and obvious consequence of using that particular intoxilizer unit. The argument that the state is in control of the breath and that by choosing to purge the sample, destroys it, is an argument that in the court's opinion is reductio ad absurdum. Mr. Murray, the defense witness, stated in substance, that the intoxilizer collects breath but not for later analysis and

then must be purged in order to be usable again. Without an addition to the present intoxilizer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample. Therefore, it would appear to the court that the destruction of any temporarily collected sample would not be through the actions or efforts of the state, but rather through the workings of the machine itself. Therefore, the court finds the cases of the Hitch and Nation are not violated where the state uses the above-described intoxilizer unit in that the state never had permanent possession of the sample, therefore had no election to make since on that unit permanent retention is impossible without modifications. The above referred to intoxilizer unit was approved by the State of California in 1973; further there have been

improvements upon the basic unit until the present AW series. The court finds that the intent of the Legislature is therefore to accept the machine as it exists without any attachments which would permanently preserve the temporarily collected samples of breath, since these attachments have been available and yet there has not been withdrawal or qualification of the state approval of the intoxilizer.

Addressing now the question of whether the defendant has the right to be advised that if she takes the breath tests as presently given in Sonoma County, that she will not have a sample preserved. The court find that §13353 of the Vehicle Code and subsequent sections are not constitutionally guaranteed, rather they are administrative policy with the immediate purpose to obtain the best evidence of the blood

alcohol content of a person believed to be driving while under the influence of an alcoholic beverage. Further, the purpose of the above sections are to avoid the possible violence which could erupt if forcible tests were made upon a recalcatrant and belligerent inebriate in order to obtain the best evidence.

§1219.3 of Article 5, Title 17 CAC does not provide for a breath sample although 1219.1 and 1219.2 provide for the retention of blood and urine samples respectively. It has been argued by the defense that at the time of the regulations it was not possible to retain the breath. It appears to this court that in the time that has passed, the Legislature has had more than ample opportunity to ammend this particular area of the law and yet the Legislature has knowingly and purposefully chosen not to mandate the retention of breath samples.

In summary the court then finds that the state in this case did not possess the breath sample in the sense and or context of the Hitch and Nation decisions and further that there is no constitutional requirement that defendant be advised of the fact that only two of the three tests have samples that are statutorily required to be preserved.

DATED: May 7th, 1981

(LAWRENCE G. ANTOLINI)
JUDGE OF THE MUNICIPAL COURT

CERTIFICATE OF SERVICE BY MAIL

CHARLES R. B. KIRK, a member of the Bar of the United States Supreme Court, hereby certifies that on August 22, 1983, a copy of the annexed Petition for Certiorari was served by mail upon the counsel of record for each of the parties respondent by depositing a copy in the United States Mail at the United States Post Office in the Federal Building, 455 Golden Gate Avenue, San Francisco, California, with first-class postage prepaid, and properly addressed as follows:

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DATED: August 22, 1983, at San Francisco, California.

CHARLES R. B. KIRK